Supreme Court, U.S.
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No. 90-1344

In the Supreme Court of the United States

OCTOBER TERM, 1990

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

NELLEY LIDY, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Respondent misperceives the nature of the decision below. The court of appeals did not hold, as respondent would now contend (Br. in Opp. 7-8), that examination of the reporting physician in this case was justified by the respondent's claimed "need" for such evidence. To the contrary, the court of appeals agreed with petitioner and with the district court (Pet. App. 7a-8a) that respondent had "failed to make" (*id.* at 4a) a showing that additional examination of the reporting physician was "reasonably necessary for the full presentation of the case" (*ibid.* (quoting 20 C.F.R. 404.950(d)). What the court of appeals held was that, notwithstanding the absence of any showing of a reasonable need for such evidence, respondent had an "absolute right" to subpoena and examine the reporting

physician under the Due Process Clause (*ibid.*). It is this holding of an "absolute right" to subpoena witnesses at agency disability hearings that creates the conflict among the courts of appeals and that imposes the enormous administrative burden that is described in the petition (Pet. 11).

2. Respondent fails in his attempt to show (Br. in Opp. 11-14) that the decision in this case creates no conflict among the courts of appeals.

a. Respondent errs in contending (*id.* at 13) that *Taylor* v. *Weinberger*, 528 F.2d 1153 (4th Cir. 1975), does not conflict with the decision in this case.[1] The Fourth Circuit held in *Taylor* that the denial of an administrative subpoena "may be reversed only for abuse of discretion." *Id.* at 1156. The court in *Taylor* further held that an abuse of discretion would exist where the agency had denied the subpoena after determining that the requested evidence would "affect its decision" (*ibid.*). In the present case, by contrast, the Fifth Circuit held that respondent has an "absolute right" to a subpoena, even though he had "failed to make" a showing that the evidence he sought was "reasonably necessary for the full presentation of the case" (Pet. App. 4a (quoting 20 C.F.R. 404.950(d)).

b. Respondent also errs in claiming (Br. in Opp. 12) that *Souch* v. *Califano*, 599 F.2d 577 (4th Cir. 1979), is not in conflict with the decision in this case.[2] The Fourth Circuit

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[1] Respondent erroneously states that *Taylor* "is not a disability case" (Br. in Opp. 13). The *Taylor* court correctly stated that the case involved the denial of a claim for "disability benefits." 528 F.2d at 1154.

[2] *Souch* involved the right to subpoena reporting physicians at a black lung disease disability hearing under the Federal Coal Mine Health and Safety Act. 599 F.2d at 577-579. Respondent erroneously seeks to distinguish *Souch* on the theory that, even though the relevant agency rules governing the issuance of administrative subpoenas are "almost identical" (Br. in Opp. 12), the underlying statute in *Souch* was not

held in *Souch* that a claimant's "right to subpoena" reporting physicians under *Richardson* v. *Perales*, 402 U.S. 389 (1971), is the "right to *request* issuance of a subpoena – not [the] absolute right to have a subpoena issued upon request." 599 F.2d at 580 n.5. Moreover, the "right to *request* issuance of a subpoena" referred to in *Souch* is the right to request a subpoena under the regulatory standard that requires a showing that the evidence sought is "reasonably necessary for the full presentation of a case." *Ibid.* (quoting 20 C.F.R. 404.926 (1970)). The holding in *Souch* that there is no "absolute right" to a subpoena plainly conflicts with the holding of the Fifth Circuit in this case.

c. Finally, respondent errs in contending (Br. in Opp. 11) that *Wallace* v. *Bowen*, 869 F.2d 187 (3d Cir. 1988), is not in conflict with the decision in this case. The Third Circuit held in *Wallace* that cross-examination of a reporting physician in a Social Security Act disability benefits case is to be allowed "when such cross-examination is necessary to the full presentation of the case." *Id.* at 193. This holding of *Wallace*, which directly incorporates the regulatory standards for the issuance of subpoenas, is obviously in conflict with the holding of the Fifth Circuit in this case that respondent has an "absolute right" to a subpoena even though he "failed to make" a showing that the evidence he sought was "reasonably necessary for the full presentation of the case" (Pet. App. 4a (quoting 20 C.F.R. 404.950(d)).

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the Social Security Act but the Federal Coal Mine Health and Safety Act. As the court of appeals concluded in *Souch*, this is a distinction without a difference, for the decisions involving subpoenas for disability benefits hearings under the Social Security Act were directly applicable. See 599 F.2d at 580.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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